

***United States Court of Appeals
for the Second Circuit***



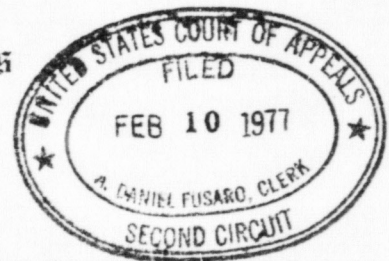
**BRIEF FOR
APPELLEE**

2-10

ORIGINAL

76-7580

IN THE
United States Court of Appeals
For The Second Circuit



INTERNATIONAL CONTROLS CORP.,
Plaintiff-Appellee,
vs.

ROBERT L. VESCO et al.,
Defendants,
and

VESCO & CO., INC.,
Defendant-Appellant.

B
P/S

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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THE ISSUE PRESENTED

1. Did the District Court properly exercise its discretion in denying the motion of Vesco & Co., Inc. for an order, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, vacating and re-entering the judgment of May 27, 1976 (Point I, infra).

[The following questions need be reached only if the Court disagrees with the proposition that the only issue which is properly before it, on this appeal from the denial of Rule 60(b) relief, is whether the District Court has abused its discretion.]

2. Did the mere filing of an amended complaint preclude the entry of a default judgment on the original complaint (Point II, infra).

3. Is the judgment of May 27, 1976 accurate, understandable and internally consistent (Point III, infra).

4. Is the reference in the judgment of May 27, 1976 to a judgment having been entered on July 12, instead of July 16, 1974, sufficiently substantive to merit the opening of the judgment in view of the entire context of Vesco & Co.'s motion pursuant to Rule 60(b) (Point IV, infra).

STATEMENT OF THE CASE

This action was commenced on June 7, 1973 and named a total of 32 defendants (including Robert L. Vesco ["Vesco"] and Vesco & Co. ["Vesco & Co."]), twenty-two of whom were named as defendants in an action commenced by the Securities and Exchange Commission on November 27, 1972 (SEC v. Vesco, et al., 72 Civ. 5001).

The complaint herein (24a-50a) contained eleven counts and alleged violation of the Securities Exchange Act of 1934, principally Section 10(b) and Rule 10b-5, and charged Vesco with fraud, self-dealing, waste of corporate assets and breach of fiduciary duty.

On October 5, 1973, a default judgment was entered against Vesco who, after being served on July 30, 1973, failed to appear to answer the complaint. (97a-99a) The judgment decreed, inter alia, that Vesco account to International Controls Corp. ("ICC") for all profits or gains improperly received by him by reason of the wrongful acts set forth in the complaint and for all injuries sustained by ICC by reason of such acts. The judgment further provided for the holding of a hearing for the purpose of

determining said loss, damage, cost and expense.

In accordance with the October 5, 1973 judgment a partial inquest was held which resulted in the entry of a judgment against Vesco for \$2,422,466.72 on July 12, 1974. (116a) Notice of said inquest was sent to defendant Vesco but he did not appear in connection therewith. Instead, defendant Vesco & Co. appeared and argued, for the first time, that it should be given the right to defend this action on Vesco's behalf on the merits. This contention was rejected by Judge Stewart and the inquest proceeded, Vesco & Co. participating throughout.

On April 8, 1974, ICC commenced a second action against Vesco (International Controls Corp. v. Robert L. Vesco, 74 Civ. 1588) and, upon his failure to answer the complaint therein, a default judgment was entered on September 11, 1974 in the amount of \$2,900,000. Vesco & Co. attempted to intervene in that action in order to defend on Vesco's behalf. Judge Stewart denied Vesco & Co.'s motion to intervene and this Court affirmed that decision.*

*See January 13, 1975 Order of this Court in International Controls Corp. v. Robert L. Vesco, Docket No. 74-2485.

On May 13, 1976, this Court rendered a decision on a prior appeal (International Controls Corp. v. Robert L. Vesco, et al., Docket No. 75-7548) by Vesco & Co. from a decision rendered against it on August 22, 1975, which decision permitted ICC to pierce the corporate veil of Vesco & Co. and use its corporate assets to satisfy a judgment entered against Vesco personally. In its decision of May 13, 1976, this Court remanded the case to the District Court due to the absence of a Rule 54(b) certification of finality in the July 12, 1974 judgment against defendant Vesco.

Upon application by ICC, Judge Stewart on May 26, 1976 signed a judgment (125a-127a), entered on May 27, 1976, which certified the finality of, and amended nunc pro tunc, the July 12, 1974 judgment. Vesco & Co. sought to appeal from the judgment of May 27, 1976 by filing a notice of appeal on July 7, 1976. (197a) ICC thereafter moved to dismiss the aforesaid appeal upon the ground that it had not been timely filed. (193a) Vesco & Co. then moved in the District Court for an order extending its time to file such notice of appeal upon the ground of excusable neglect (183a) and at the same time moved in this Court for reconsideration of the issues left undecided on its prior appeal. By orders dated September 14, 1976, this Court granted ICC's motion to dismiss Vesco & Co.'s appeal from the May 27, 1976

judgment and denied Vesco & Co.'s motion for reconsideration of the issues raised in the earlier appeal.

By notice of motion dated September 14, 1976 (204a), Vesco & Co. made a further motion in the District Court for an order pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure vacating the May 26, 1976 amended judgment and immediately re-entering said judgment in its entirety. The stated purpose of that motion, reflected by the caption thereon, was "TO PERMIT TIMELY APPEAL." By memorandum decision (207a) filed October 27, 1976, Judge Stewart denied this motion, as well as Vesco & Co.'s motion for an order extending its time to file a notice of appeal as aforesaid. It is from this opinion and order of Judge Stewart that Vesco & Co. purports to appeal.

Vesco & Co.'s brief on appeal ("Vesco & Co.'s brief") raises no question with respect to the propriety of Judge Stewart's denial of its motion for an extension of time to file its notice of appeal, and reference thereto reveals that Vesco & Co. has unequivocally disclaimed any intention to take issue with Judge Stewart's denial of that motion (Vesco & Co.'s brief, at 6). Accord-

ingly, and as set forth below, the only issue which can properly be raised on this appeal from denial of Rule 60(b) relief is the propriety of the denial itself and not the merits of the judgment from which relief is sought. Vesco & Co.'s main arguments on appeal, referred to in detail below, are consequently not properly before this Court.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MOTION OF VESCO & CO., INC. FOR AN ORDER, PURSUANT TO RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, VACATING AND RE-ENTERING THE JUDGMENT OF MAY 27, 1976.

As the authorities clearly indicate, the only issue which is properly before this Court on an appeal from the denial of a motion to vacate a judgment under Rule 60(b)(6)* of the Federal Rules of Civil Procedure is whether the District Court has abused its discretion in denying the motion. See, e.g., Sampson v. Radio Corporation of America, 434 F.2d 315, 317 (2d Cir. 1970);

* Rule 60(b), in relevant part, reads as follows:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

* * *

(6) any other reason justifying relief from the operation of the judgment."

Hines v. Seaboard Airline Railroad Co., 341 F.2d 229, 232 (2d Cir. 1965); Wagner v. United States, 316 F.2d 871, 872 (2d Cir. 1963); Parker v. Broadcast Music Inc., 289 F.2d 313, 314 (2d Cir. 1961). "[T]he denial of a 60(b) motion does not bring up for review on appeal the order sought to be modified." Hines v. Seaboard Airline Railroad Co., supra at 232.

It is well settled that a defeated litigant cannot circumvent the time limitations on appeal by styling what is in effect a belated petition for reconsideration as a motion under Rule 60(b). See, e.g., Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 71 (2d Cir. 1973). As set forth in Hodgson v. United Mine Workers of America, 473 F.2d 118, 124 (D.C. Cir. 1972), a motion under Rule 60(b) "cannot be used to vacate judgments and reinstate them to start the time for appeal anew." "The only issue," continued the Court, "which can be raised on appeal from a denial of Rule 60(b) relief is the propriety of that denial, and not the merits of the judgment from which the relief was sought." Id. Accord, Wagner v. United States, supra; Saenz v. Kenedy, 178 F.2d 417, 419 (5th Cir. 1950); In re Marachowsky Stores Co., 188 F.2d 686, 689 (7th Cir.), cert. denied, 342 U.S. 822, 72 S.Ct. 41, 96 L.Ed. 622 (1951);

Smith v. Stone, 308 F.2d 15, 17 (9th Cir. 1962).

Wagner v. United States, supra, was a tax-refund action against the United States in the Southern District of New York. In serving a notice of motion, stated to be pursuant to Rule 60(b), that a judgment for the defendant entered therein "be vacated and set aside on the ground that such judgment was contrary to the law and contrary to the evidence upon which the said judgment was entered," or, in the alternative, that it "be resettled and re-entered in order to permit the plaintiffs to file a notice of appeal therefrom," plaintiffs' attorney alleged that he was on vacation when the judgment was entered and did not learn of its entry until after the time to appeal had expired. 316 F.2d at 872. An opposing affidavit stated that notice of the decision had appeared in the New York Law Journal on July 3, 1961, and that the government had received post-card notice of entry of judgment from the Clerk on that day. Plaintiffs then appealed from the denial of their Rule 60(b) motion. In a per curiam decision by Judges Moore, Friendly and Hays, this Court stated as follows:

"The catch-all clause of Rule 60(b)(6), authorizing the court to relieve a party from a judgment for 'any other reason justifying relief,' cannot be

read to encompass a claim of error for which appeal is the proper remedy; such a reading would emasculate the provisions of Rule 73(a), now codified in 28 U.S.C. § 2107, which strictly limit the time for appeal, and which are re-enforced by the last clause of Rule 6(b) and the last sentence of Rule 77(d)." Id. at 872.

In Perrin v. Aluminum Co. of America, 197 F.2d 254 (9th Cir. 1952), in which appellants made a Rule 60(b) (6) motion to vacate, the Court stated as follows:

"Rule 60(b) was not intended to be resorted to as an alternative to review by appeal, nor as a means of enlarging by indirection the time for appeal except in compelling circumstances where justice requires that course. Cf. Hill v. Hawes, 320 U.S. 520, 64 S. Ct. 334, 88 L.Ed. 283. Appellants had opportunity to obtain appellate review of the very rulings of which they now complain but failed to take advantage of the opportunity within the time prescribed by Rule 73(a). Having in consequence of their own lack of diligence been turned away at the front door they now seek entry at the rear. Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal." Id. at 255 (Emphasis added.)

Accord, Demers v. Brown, 343 F.2d 427 (1st Cir. 1965), an appeal from a denial of Rule 60(b) relief, in which the Court stated that "[i]t must be perfectly apparent that plaintiff is seeking to appeal from the original judgment by indirection after the time has expired. What he cannot do directly he cannot do indirectly." Id. at 428.

The scope of appellate review of the denial of Rule 60(b) relief will depend upon the issue involved. Whether the Rule 60(b) motion on its face states any reason for relief under the Rule, and, if so, whether the motion is made beyond the maximum time permitted by the Rule usually involve questions of power and hence an issue of law that is reviewable as such. 7 J. Moore, Federal Practice ¶ 60.19, at 226 (2d ed. 1975). However, if, as in the case at bar, the District Court has power to grant relief, "then its determination to grant or deny relief normally involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted: This matter, then, is largely within the judicial discretion of the trial court." Id.

In purported support of its proposition that the District Court abused its discretion by failing to grant such relief from the May 27, 1976 judgment as would permit it to file a timely appeal therefrom, Vesco & Co. invokes only the following two inapposite decisions: Expeditions Unlimited v. Smithsonian Institute, 500 F.2d 808 (D.C. Cir. 1974), and Fidelity & Deposit Company of Maryland v. Usiform Hail Pool, Inc., 523 F.2d 744 (5th Cir. 1975). As set forth below, the foregoing decisions are evidence only

of the fact that Judge Stewart properly exercised his discretion in denying the motion of Vesco & Co. for Rule 60 (b) relief.

In Expeditions Unlimited v. Smithsonian Institute, supra (Vesco & Co.'s brief, at 18), an action in which the Court of Appeals for the District of Columbia reversed a District Court order denying a motion to vacate, it was incontroverted that none of the parties knew of the judgment therein until ten months after it had been entered. The Court found as fact that the negligence of the Court and the Clerk, not the negligence of counsel, had resulted in the failure to timely appeal. The foregoing facts starkly contrast with those at bar, which reveal that Vesco & Co. had actual notice of the entry of judgment five days before the thirty-day time to appeal had expired. (210a) Moreover, the District Court found as fact that Vesco & Co.'s lack of knowledge prior thereto was the result of its own negligence. (209a-211a)

In Fidelity & Deposit Company of Maryland v. Uniform Hail Pool, Inc., supra, (Vesco & Co.'s brief, at 18), as in Expeditions Unlimited and contrary to the case at bar, "none of the parties knew of the entry of judgment

and none could be said to have relied upon it." 523 F.2d at 751. Accordingly, the Court of Appeals for the Fifth Circuit held that the District Court acted properly in vacating and re-entering its judgment under Rule 60(b). The Court continued as follows:

"In both cases counsel diligently sought to discharge the duty implicit in F.R. Civ. P. 77(d) to make suitable inquiries to discover for itself the status of the case. Indeed, there is an additional element in the present case. Here, unlike the mere failure of the District Court in Jackson Tool & Dye either to postpone entering judgment or to respond to counsel's letters, the District Court assured counsel that his repeated inquiries were unnecessary (and, possibly were beginning to seem repetitious), and that counsel would be informed of the entry of judgment." Id. at 751.

The inaction of counsel for Vesco & Co. in the case at bar does not compare favorably with the diligence displayed by counsel in Fidelity. As Judge Stewart stated in his memorandum decision of October 27, 1976:

"First, defendant claims that it did not know that the judgment was entered on May 27, 1976. Defendant admits that its attorneys saw the order signed on May 26 (Littman Affidavit ¶ 3). Defendant apparently thought that the prevailing party entered a judgment, and that this party might delay entry so as to put off the 'inevitable' appeal (Littman ¶ 3). Defendant was entirely mistaken about the procedure in the federal courts where a signed order is sent directly from chambers to the Clerk's Office where it is entered in the docket shortly thereafter. (See Rules 58(2) and 79(a) of the F. R. Civ. P.) Ignorance of the Court's procedures is not 'excusable

neglect'." Rousseau v. Flota Mercante Grancolombiana, 303 F.Supp. 1404 (S.D.N.Y. 1969); Nichol-Morris Corp. v. Morris, 279 F.2d 81 (2d Cir. 1960).

"Second, defendant claims that it was not notified by the Clerk's Office of the entry of judgment as required by F. R. Civ. P. 77(d). This is contradicted by the notation 'M/N' in the docket following the entry of the judgment on May 27, 1976. This notation is used by the Clerk's Office to indicate that notice has been mailed to the parties (Camhy Affidavit, ¶ 4). Even if notice were not mailed by the Clerk, Rule 77(d) specifically provides that '[l]ack of notice of the entry by the Clerk does not affect the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure' where the sole ground for relief is 'excusable neglect.' In this case, but for defendant's apparent ignorance of the Federal procedures for entry of judgment, it would have known that entry would have immediately followed signing of the order, and a routine check with the docket clerk would have informed it that this procedure had been followed. We also note that notice of the order appeared in the June 8, 1976 issue of The New York Law Journal. Thus, even if defendant did not receive notice from the Clerk's Office, it should have known independently that the order was entered, so any failure on the part of the Clerk's Office is not 'excusable neglect'. See Nichols-Morris, supra at 83." (209a-211a)

One final point with respect to Fidelity & Deposit Company of Maryland v. Usaform, supra, is in order. Vesco & Co. alleges that there is a decided lack of prejudice to ICC in the case at bar, which "fact" should purportedly have resulted in the granting by the District Court of Vesco & Co.'s Rule 60(b) motion. In invoking the Fidelity decision with respect to this proposition, Vesco & Co.

refuses to acknowledge that the "lack of prejudice" involved therein was a concomitant of the fact that neither party knew of the entry of judgment until after the time to appeal had run, in clear contrast with the facts of the case at bar. As set forth therein, "[t]here was no prejudice to either side, because neither side knew of the entry of a judgment." 523 F.2d at 751. (Emphasis added.)

It cannot be gainsaid that Vesco & Co. is seeking, by its appeal from the District Court's denial of its Rule 60(b) motion, to appeal from the amended judgment of May 27, 1976 by indirection after the time for appeal has expired. Vesco & Co. so stated in its notice of motion dated September 14, 1976 (204a), styled as a "NOTICE OF MOTION UNDER F. R. CIV. P. 60(b) TO VACATE AND REENTER ORDER TO PERMIT TIMELY APPEAL," and so states again in Point "IV" of its brief (viz., "The District Court abused its discretion by failing to grant relief from the May 26 judgment to permit the Company to file a timely appeal therefrom"). (Emphases added.) As set forth above, a defeated litigant cannot circumvent the time limitations on appeal by moving under Rule 60(b).

In conclusion, the only issue properly before the Court is whether the District Court abused its discretion

in denying Vesco & Co.'s Rule 60(b) motion. The two cases invoked by Vesco & Co. in this regard, Expeditions Unlimited v. Smithsonian Institute, supra, and Fidelity & Deposit Company of Maryland v. Usaform Hail Pool, Inc., supra, reflect only a proper exercise of discretion by Judge Stewart in denying the motion of Vesco & Co. for an order, pursuant to Rule 60(b)(6), vacating and re-entering the judgment of May 27, 1976.

POINT II

NEITHER THE MERE FILING NOR THE FILING
AND ATTEMPTED SERVICE OF THE AMENDED
COMPLAINT HEREIN MAY PROPERLY BE HELD
TO OPEN THE DEFAULT OF VESCO IN THE
CONTEXT OF THE INSTANT MOTION.

As set forth above, all arguments of Vesco & Co. which in effect seek review of the judgment from which Rule 60(b) relief is sought are not properly before this Court on an appeal from the District Court's denial of such relief. Assuming, arguendo, that this Court is not in accord with the foregoing proposition, applicable authority with respect to the merits of the judgment from which Vesco & Co. seeks relief is set forth below.

It is the position of ICC that neither the mere filing nor the filing and attempted service of the amended complaint herein may properly be held to open the default of Vesco. Vesco & Co. contends in Point I of its brief that "all authority seems to be completely to the contrary, perhaps as most clearly stated in the case of Phillips v. Murchison" (Vesco & Co.'s brief, at 9). Contrary to the impression which Vesco & Co. attempts to convey, the decision of Phillips v. Murchison, 194 F. Supp. 620 (S.D.N.Y. 1961), does not bear on the issue at bar.

The original complaint in Phillips was filed on February 24, 1961. Before issue was joined, the plaintiff

filed an amended complaint on March 21, 1961. As Judge Dawson noted, "[u]p to the time of the filing of the amended complaint no service had been effected on Clint W. Murchison, Jr., although, apparently, the other defendants had been served." Id. at 621. Plaintiff, after filing the amended complaint, attempted to effect service upon Murchison by serving him with a copy of the original complaint. In that context, the original complaint was properly held by the Court to have been superseded.

Vesco & Co. has evidently not deemed it expedient to call the facts of the Phillips decision to the attention of the Court. In offering a list of authorities and citations (Vesco & Co.'s brief, at 10) and in offering the unqualified statement that the aforesaid authority "holds that the filing of an amended pleading ipso facto renders an original pleading defunct" (Id. at 10), Vesco & Co. carries the technique of expediency too far. None of the aforesaid authorities or citations, offered by Vesco & Co. to the Court without benefit of explication or analysis, impinge upon the proposition that the mere filing of an amended complaint is, without more, an insufficient predicate for the opening of a default.

The rationale of the decisions invoked by Vesco & Co. is that a default judgment may be vacated by subse-

quent proceedings in the same action which are inconsistent with the judgment continuing in force. Absent service of the amended complaint, there can be no subsequent proceeding - either consistent or inconsistent - in the action. This proposition is not impinged upon by virtue of the fact that Rule 3 of the Federal Rules of Civil Procedure provides that "[a] civil action is commenced by filing a complaint with the Court." As Professor Moore states:

"While the proper commencement of an action is a prerequisite to the entry of a valid judgment, where defendant raises objection to the validity of the commencement, nonetheless proper commencement does not, alone, vest the court with power to adjudicate. Though the time when the action is commenced is significant particularly in determining whether the action has been brought within the limitations period, commencement is merely the threshold to litigation; unless it is ultimately followed by proper service of original process, or defendant waives proper service, the potential jurisdiction which commencement invokes never ripens into actual jurisdiction." 2 J. Moore, Federal Practice ¶ 4.09, at 1024, 1025 (2d ed. 1975). (Footnotes omitted; emphasis added.)

It is respectfully submitted that neither the mere filing nor the filing and attempted service of the amended complaint herein may properly be held to open the default judgment against Vesco on the original complaint in the absence of any other subsequent proceeding in the same action which could be said to be inconsistent with the judgment

continuing in effect.*

As Judge Stewart stated upon analysis of all authorities again tendered to this Court by Vesco & Co. on this appeal:

"We think that when an amended pleading is required to be served on a party, it similarly requires proper service in order to become effective as to this party. Thus, we conclude that if service is not, or cannot, be made of the amended pleading, it does not supersede the original. The question to be determined, therefore, is whether Vesco was properly served with the amended complaint." (213a-214a) (Emphasis in original.)

After giving due consideration to all relevant facts (214a-215a), Judge Stewart found "that the amended complaint was not properly served and thus, that the amended complaint did not supersede the original, and that all the judgments properly relate to the original

*The rationale for such a rule is evident when one considers the result that would ensue if Vesco & Co.'s position is accepted. ICC would have effectively been barred from filing an amended complaint (which in this case added new defendants, new claims and reasserted all claims of the original complaint against Vesco) merely because it was impossible to serve the amended complaint on Vesco. In effect, the position urged by Vesco & Co. would require a plaintiff to gamble that it could re-serve a defendant who was already in default, for if it could not re-serve it would be precluded from proceeding further against that defendant. In short, acceptance of Vesco & Co.'s argument would effectively dismiss this action as to Vesco.

complaint." (215a) The basis of Judge Stewart's finding of fact in this regard is set forth in his accurate reconstruction of the events surrounding the attempted service of the amended complaint:

"The affidavit recounted that two persons, who had been authorized to effect service, went to Nassau, Bahamas and there located the last known residence of Vesco (Bondi Affidavit ¶ 12).[*] Two gardeners were present on the grounds of the residence, and they called a private security officer when the process servers identified themselves and stated their mission. After the security officer arrived, the process servers again identified themselves. The officer and gardeners both refused to accept the papers, and the officer took photographs of the process servers. At this point, one server threw the papers over the wall onto the grounds, but the gardeners handed them back to the officer who in turn threw them back into the process servers' car (Bondi Affidavit ¶¶ 13 and 14)." (214a, 215a)**

Judge Stewart also made the following significant statement, which ICC adopts in conclusion:

"All the proceedings and ensuing judgments against Vesco have clearly and consistently been based on, and related back to, the original, not the amended, complaint. Defendant apparently had no quarrel with this when it filed its brief on appeal to the Second Circuit since it attacked the default on the basis of the adequacy of service of the original summons and complaint, but never raised the point it now presses. There are in our

* There is no evidence that Vesco continued to reside there at the time of the attempted service.

** One could well imagine Vesco & Co. vehemently challenging such "service" of the amended complaint had ICC taken the position that the amended complaint had been properly served upon Vesco.

view, therefore, substantial equitable considerations tending to suggest that defendant should not be permitted to raise for the first time at this very late hour, a procedural issue which could have been presented long ago. In any event, however, we find that defendant's contention is without merit." (212a; emphasis added.)*

Finally, Vesco & Co. is clearly without standing to contend that the mere filing or the filing and attempted service of the amended complaint opens the default of Vesco. Vesco & Co. cites no authorities in support of the proposition that it should be permitted to defend ICC's action on Vesco's behalf in this or any other regard. Although this Court presumably did not reach that issue on Vesco & Co.'s prior appeal from the August 22, 1975 order (supra, at 3), it necessarily decided that question when it affirmed the District Court's denial of Vesco & Co.'s motion to intervene in yet another action commenced against Vesco by ICC and in which Vesco & Co. was not a named defendant.

(Supra, at 2.) There, in seeking to intervene, Vesco & Co.

*Even assuming, arguendo, that Vesco had in fact been effectively served with the amended complaint herein, contrary to Judge Stewart's finding of fact in his memorandum decision of October 27, 1976 (214a), no authority invoked by Vesco & Co. would require that the default judgment against Vesco on the original complaint be opened in the absence of an appearance by Vesco in response to service of the amended complaint, or in the absence of any other subsequent proceeding in the same action which could be said to be inconsistent with the judgment continuing in effect.

advanced its essentially boot strap argument that, since it had been found for the purpose of preliminary injunction to be Vesco's alter ego, it should be entitled, as his alter ego, to intervene and defend on his behalf.

In its brief to this Court on the aforesaid prior appeal (as well as on its appeal in the other action referred to above), Vesco & Co. cited a number of suretyship cases in support of its argument that it should be entitled to defend this action on the merits for Vesco. There is, however, absolutely no basis for analogizing the instant case to the suretyship situation. Vesco & Co.'s position is quite different from that of a surety who would have an in personam liability on the underlying claim payable out of its own property irrespective of whether it was holding property of its principal. Vesco & Co. stands in no such position. As it relates to the present situation, Vesco & Co.'s only involvement is that of a holder of assets which belong to Vesco which are subject to the claims of ICC as Vesco judgment creditor.

POINT III

THE JUDGMENT OF MAY 27, 1976
IS ACCURATE, UNDERSTANDABLE
AND INTERNALLY CONSISTENT.

Point II of Vesco & Co.'s brief on appeal is a recapitulation of the second ground of its motion to vacate the judgment of May 27, 1976, viz., that the May 27, 1976 judgment "on its face, does not make sense" if its references to the various counts of the complaint are read as relating to the original complaint. (215a) Although this issue is not properly before this Court on the instant appeal from the denial of Rule 60(b) relief, ICC is in accord with and calls Judge Stewart's following finding of fact to the attention of this Court:

"We have carefully compared the counts of the complaint and those enumerated in the May 27, judgment, and we conclude that the references in the judgment are accurate. Thus, we find that the judgment is 'comprehensible' on its face." (215a)

ICC respectfully contends that the foregoing finding of fact, supported by analysis of the pleadings and the judgment of May 27, 1976, is dispositive of the spurious and untimely contention by Vesco & Co. that the foregoing judgment "does not make sense."

POINT IV

REFERENCE TO A JUDGMENT HAVING BEEN ENTERED ON JULY 12, INSTEAD OF JULY 16, 1974, IS AN INSUFFICIENT PREDICATE FOR OPENING THE JUDGMENT OF MAY 27, 1976.

Vesco & Co. contends in Point III of its brief on appeal that "[T]he May 26th Judgment was improperly entered nunc pro tunc as of July 12, 1974, and should be vacated and re-entered as of July 16, 1974." (Vesco & Co.'s brief, at 15) The foregoing "point" corresponds to the final ground urged by Vesco & Co. below with respect to its motion for an order vacating the May 27, 1976 judgment. ICC respectfully contends that Judge Stewart's following statement is dispositive:

"Finally, defendant seeks to vacate the May 27 judgment on the ground that the reference to a judgment having been entered on July 12, instead of July 16, 1974, was incorrect. We think that this ground is not sufficiently substantive to merit our opening of the judgment especially in view of the entire context of this motion." (216a; emphasis added.)

The "entire context of this motion" is supportive only of the fact that Vesco & Co. is attempting to circumvent the time limitations on appeal by impermissible resort to Rule 60(b), notwithstanding the fact that a motion under

Rule 60(b) cannot be used to vacate judgments and reinstate them to start the time for appeal anew. Supra at 6, 7. Although Vesco & Co. cannot now properly be heard with respect to the propriety of entry of the May 27, 1976 judgment nunc pro tunc, it is respectfully submitted that Judge Stewart's finding of lack of merit with respect to this claim is, in any event, both accurate and controlling.

Indeed, the phrase "nunc pro tunc" is merely "descriptive of the inherent power of the court to make its record speak the truth — to record that which was actually done but omitted to be recorded." A.B.C. Packard, Inc. v. General Motors Corporation, 275 F.2d 63, 75 (9th Cir. 1960); W. F. Sebel Co. v. Hessee, 214 F.2d 459, 462 (10th Cir. 1954). In entering the amended judgment nunc pro tunc, Judge Stewart was merely confirming, in response to a question raised by this Court, that the original July 12, 1974 judgment was final in certain respects and should have contained the Rule 54(b) certification.

CONCLUSION

For all of the foregoing reasons, the opinion and order appealed from should be affirmed in all respects.

Dated: New York, New York
February 10, 1977

Respectfully submitted,

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Service of ~~three~~ ⁸ copies of the within
is admitted this ⁹~~10~~th day of February 1977

① Joanne Paterno

② _____

Rec'd AF+K 4/45
by hand 2-9-77
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